JUL 2 3 2007

No. 06-1415

In the Supreme Court of the United States

JESUS DE LA PAZ SANCHEZ, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether unauthorized use of a motor vehicle, in violation of Tex. Penal Code § 31.07 (West 1992), is a "crime of violence" under 18 U.S.C. 16(b).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 6a-7a) is reported at 473 F.3d 133. The most recent decisions of the Board of Immigration Appeals (App., *infra*, 1a-2a) and the immigration judge (Pet. App. 1a-4a) are unreported. A prior order of the court of appeals (App., *infra*, 3a-4a) is unreported. Prior decisions of the Board of Immigration Appeals (Pet. App. 5a; App., *infra*, 5a-6a, 7a-9a) and the immigration judge (App., *infra*, 10a-16a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 15, 2006. The petition for a writ of certiorari was filed on February 13, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a native and citizen of Mexico. In July 1985, he was admitted to the United States as an immigrant. In November 1992, he committed the offense of unauthorized use of a motor vehicle, in violation of Tex. Penal Code § 31.07 (West 1992). In May 1996, he was convicted of that offense and sentenced to one year in jail. Admin. R. 286; Pet. App. 2a; App., *infra*, 11a, 14a.

The Immigration and Naturalization Service (INS) subsequently commenced removal proceedings against petitioner. Admin. R. 286.[1] As relevant here, the INS alleged that petitioner was removable pursuant to 8 U.S.C. 1227(a)(2)(A)(iii), because the offense of unauthorized use of a motor vehicle was a "crime of violence" under 18 U.S.C. 16 for which the prison term was at least one year, and the offense was therefore an "aggravated felony" under 8 U.S.C. 1101(a)(43)(F). Admin. R. 286. Under 18 U.S.C. 16(b), the provision at issue here, the term "crime of violence" means "any * * * offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."

2. The immigration judge (IJ) held that, under Fifth Circuit precedent, "unauthorized use of a [motor] vehicle [i]s a crime of violence and an aggravated felony." App., *infra*, 14a. The IJ therefore ruled that petitioner was removable on that ground (as well as on the basis of

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[1] The INS's immigration-enforcement functions have since been transferred to United States Immigration and Customs Enforcement in the Department of Homeland Security. See 6 U.S.C. 251 (Supp. IV 2004).

another prior conviction). *Id.* at 11a-14a. The IJ also determined that petitioner was ineligible for various forms of relief and ordered him removed to Mexico. *Id.* at 14a-16a.

The Board of Immigration Appeals (BIA) agreed with the IJ that unauthorized use of a motor vehicle is a "crime of violence" and (because petitioner received a one-year jail term) an aggravated felony. App., *infra*, 8a (citing *United States* v. *Galvan-Rodriguez*, 169 F.3d 217 (5th Cir.), cert. denied, 528 U.S. 837 (1999)). The BIA also agreed with the IJ that petitioner was ineligible for relief, and therefore dismissed petitioner's appeal (except insofar as it held that the IJ erred in finding that petitioner was removable on the basis of the other prior conviction). *Id.* at 7a-9a. The BIA subsequently granted petitioner's motion to reconsider, however, and remanded the case to the IJ. *Id.* at 5a-6a. The BIA held that, contrary to its initial decision, the record demonstrated that petitioner had pleaded guilty to unauthorized use of a motor vehicle (rather than having been found guilty of that offense at trial), and that petitioner might therefore be eligible for a waiver of inadmissibility under former Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. 1182(c) (1994) (repealed 1996), as a result of this Court's decision in *INS* v. *St. Cyr*, 533 U.S. 289 (2001). App., *infra*, 5a-6a.

On remand, the IJ found that petitioner was ineligible for a waiver of inadmissibility because there is no parallel ground of exclusion for the offense of unauthorized use of a motor vehicle. Pet. App. 1a-4a. The BIA agreed with the IJ and dismissed petitioner's appeal. *Id.* at 5a. After the court of appeals remanded the case on joint motion of the parties, App., *infra*, 3a-4a, the BIA "f[ou]nd no reason to disturb [its] previous decision

to find [petitioner] removable as charged and ineligible for a waiver of inadmissibility," *id.* at 2a. The BIA therefore dismissed petitioner's appeal. *Id.* at 1a-2a.

3. The court of appeals denied petitioner's petition for review. Pet. App. 6a-7a. It rejected petitioner's contention that the Texas offense of unauthorized use of a motor vehicle is not a "crime of violence" under 18 U.S.C. 16(b), finding the claim foreclosed by its decision in *Galvan-Rodriguez, supra.* Pet. App. 7a. The court also rejected petitioner's contention that he was eligible for a waiver of inadmissibility. *Ibid.*[2]

ARGUMENT

Petitioner renews his contention (Pet. 3-4) that the Texas offense of unauthorized use of a motor vehicle is not a "crime of violence" under 18 U.S.C. 16(b). The IJ, BIA, and court of appeals all correctly rejected that contention, and further review is unwarranted.

A person commits the offense of unauthorized use of a motor vehicle if he "intentionally or knowingly operates another's * * * motor-propelled vehicle without the effective consent of the owner." Tex. Penal Code § 31.07(a) (West 1992). At the time petitioner committed that offense, it was a "felony of the third degree," *id.* § 31.07(b); at the time he was sentenced, it was a "state jail felony," *id.* § 31.07(b) (1995).[3] An offense is a "crime

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[2] Petitioner does not seek review of the court of appeals' holding that he is ineligible for a waiver of inadmissibility.

[3] A felony of the third degree was punishable by between two and ten years in "the institutional division of the Texas Department of Criminal Justice" or by a maximum of one year in "a community correctional facility." Tex. Penal Code § 12.34(a) (West 1992). A state jail felony was punishable by between 180 days and two years in "a state jail." *Id.* § 12.35(a) (1995).

of violence" under 18 U.S.C. 16(b) if it is "a felony" that, "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." Petitioner does not dispute that the Texas offense of unauthorized use of a motor vehicle is a felony. But he argues that the offense "does not involve a substantial risk of physical force against the property of another in the commission of a felony." Pet. 3. That argument lacks merit and does not warrant review by this Court.

In *United States* v. *Galvan-Rodriguez*, 169 F.3d 217, cert. denied, 528 U.S. 837 (1999), the decision on which it relied here, the Fifth Circuit correctly held that the unauthorized use of a motor vehicle involves a substantial risk of the use of physical force against the property of another because the offense "carries a substantial risk that the vehicle might be broken into, 'stripped,' or vandalized." *Id.* at 219. Contrary to petitioner's assertion (Pet. 3-4), *Galvan-Rodriguez* is consistent with this Court's subsequent decision in *Leocal* v. *Ashcroft*, 543 U.S. 1 (2004), which held that the use of physical force contemplated by 18 U.S.C. 16(b) "requir[es] a higher *mens rea* than * * * merely accidental or negligent conduct," 543 U.S. at 11. Since *Galvan-Rodriguez* relied on the risk that the vehicle would be broken into, "stripped," or vandalized, and since such conduct is intentional, not accidental or negligent, *Galvan-Rodriguez* is "fully consistent" with *Leocal*, as the Fifth Circuit has recently held. *Brieva-Perez* v. *Gonzales*, 482 F.3d 356, 361 (5th Cir. 2007). Petitioner cites no decision of any court of appeals—either before *Leocal* or after—holding that unauthorized use of a motor vehicle is not a "crime of violence" under 18 U.S.C. 16(b), and we are not aware of any.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

PETER D. KEISLER
Assistant Attorney General

DONALD E. KEENER
JENNIFER PAISNER
Attorneys

JULY 2007

APPENDIX A

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A39 718 293 - Houston Date: [Oct. 04, 2005]

In re: JESUS DE LA PAZ-SANCHEZ

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Gino M. Mesa, Esquire

ON BEHALF OF DHS:
Gerrie Zhang, Assistant Chief Counsel

ORDER:

PER CURIAM. The United States Court of Appeals for the Fifth Circuit has remanded the record to this Board, upon joint motion of the parties, for supplementary briefs. Upon review of the parties' further briefing, we agree with the Department of Homeland Security that our recent decision in *Matter of Brieva*, 23 I&N Dec. 766 (BIA 2005), controls the respondent's case. *See*

also Ramirez v. Ashcroft, 361 F. Supp. 2d 650 (S.D. Tex. 2005). As such, we find no reason to disturb our previous decision to find the respondent removable as charged and ineligible for a waiver of inadmissibility pursuant to section 212(c) of the Act. Accordingly, the appeal is dismissed.

/s/ ILLEGIBLE
FOR THE BOARD

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-60880

JESUS DE LA PAZ SANCHEZ, PETITIONER

v.

JOHN ASHCROFT, US ATTORNEY GENERAL,
RESPONDENT

PETITION FOR REVIEW OF AN ORDER OF THE BOARD OF IMMIGRATION APPEALS

[Filed: Dec. 29, 2004]

Before DAVIS, SMITH, and DENNIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the joint motion of the parties to remand petition is [GRANTED].

IT IS FURTHER ORDERED that the joint motion of the parties to dismiss petition is [GRANTED].

IT IS FURTHER ORDERED that the joint motion of the parties to hold petition in abeyance is [denied as unnecessary].

IT IS FURTHER ORDERED that the joint alternative motion of the parties for an extension of ten days after disposition of pending motions in which to file the administrative record is [denied as unnecessary].

/s/ ILLEGIBLE

APPENDIX C

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A39-718-293 - Houston Date: [Sept. 10, 2002]

In re: DE LA PAZ SANCHEZ, JESUS

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Pro se

ORDER:

PER CURIAM. The respondent moves the Board pursuant to 8 C.F.R. § 3.2 to reconsider our decision dated July 16, 2002. The respondent contends that the Board erred in finding that he was not eligible for a waiver of inadmissibility under section 212(c) of the Immigration and Nationality Act, pursuant to INS v. St. Cyr, 533 U.S. 289 (2001), because he was found guilty and had not pled guilty to unauthorized use of a motor vehicle. The respondent asserts that he pled guilty on May 14, 1993, but was re-sentenced on May 23, 1996, due to probation violations. The conviction records (Exh. 2, at tab B) support the respondent's claim that he was placed on community supervision on May 14, 1993, and

that he was re-sentenced on May 23, 1996, due to probation violations. In this regard, we note that, in Texas, a sentence to community supervision occurs upon a plea of guilty and results in a deferred adjudication. The Service has filed no response to the respondent's motion and thus, does not dispute the respondent's statements regarding his conviction. We therefore find that a remand is warranted in the present case in order to allow the respondent an opportunity to apply for a section 212(c) waiver.

Accordingly, the motion is *granted*, the proceedings are reopened, and the record is remanded to the Immigration Judge for further proceedings consistent with the foregoing opinion.

/s/ ILLEGIBLE
FOR THE BOARD

APPENDIX D

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A39 718 293 - Houston Date: [July 16, 2002]

In re: JESUS DE LA PAZ SANCHEZ

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:

Gino M. Mesa, Esq.

ON BEHALF OF SERVICE:

Cara Wilkins, Assistant District Counsel

ORDER:

PER CURIAM. The appeal is sustained in part as a result of the presently controlling decisions of the United States Court of Appeals for the Fifth Circuit in *United States v. Hernandez-Avalos*, 251 F.3d 505 (5th Cir. 2001) and *United States v. Chapa-Garza*, 243 F.3d 921 (5th Cir. 2001). *See Matter of Olivares-Martinez*, 23 I&N Dec. 148 (BIA 2001). Therefore, we find that the respondent is not removable as a result of his conviction for driving while intoxicated.

However, the respondent still has a conviction, dated May 23, 1996, for unauthorized use of a motor vehicle, for which he was sentenced to one year confinement (Exh. 2). This offense constitutes a crime of violence for which the term of imprisonment was one year and thus is an aggravated felony. *See* section 101(a)(43)(F); *See U.S. v. Galvan-Rodriguez*, 169 F.3d 217 (5th Cir. 1999).

On appeal, the respondent contends that he is eligible for relief under section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c). While this appeal has been pending, the United States Supreme Court determined that the restrictions on section 212(c) relief do not apply retroactively to aliens who entered into a plea agreement prior to April 24, 1996, the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214. *See INS v. St. Cyr*, 289 U.S. 533 (2001). However, this alien is not aided by the Supreme Court's *St. Cyr* ruling. The record reflects that the respondent is not eligible for section 212(c) relief because the alien did not enter into a plea agreement, but rather was tried and found guilty of the crime which provides the basis for these proceedings.

The respondent also maintains that he is eligible for cancellation of removal. Because the respondent has been convicted of an aggravated felony, he is ineligible for cancellation of removal. *See* section 240A(a)(3) of the Act.

We also note that we are without authority to entertain the respondent's arguments regarding the constitutionality of the statute rendering him removable. *See Matter of C-*, 20 I&N 529, 532 (BIA 1992).

Accordingly, the appeal is sustained in part and dismissed in part.

/s/ ILLEGIBLE
FOR THE BOARD

APPENDIX E

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Houston, Texas

File No.: A 39 718 293

IN THE MATTER OF
JESUS DE LA PAZ SANCHEZ, RESPONDENT

IN REMOVAL PROCEEDINGS

Nov. 2, 2000

CHARGE:	Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act as amended [aggravated felony/ crime of violence]
APPLICATIONS:	Cancellation of removal and adjustment of status under Sections 240A(b)(1) and 245(a) of the Immigration and Nationality Act as amended.

ON BEHALF OF RESPONDENT:

Laura Arteaga, Esquire
7457 Harwin, Suite 260
Houston, Texas 77036

ON BEHALF OF SERVICE:

Cara Wilkins, Assistant District Counsel
Houston, Texas

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a native and citizen of Mexico, born November 4, 1964. He is approximately 36 years of age.

The Service issued a Notice to Appear, dated June 9, 2000. The respondent appeared with counsel today, November 2, 2000, admitted the allegations on the Notice to Appear but denied the charge under Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act as amended (the Act).

The issues before this Court are whether the respondent is subject to removal, under Section 237(a)(2)(A)(iii) of the Act and whether the respondent is eligible for relief from removal.

The respondent agrees that he was convicted for driving while intoxicated on April 8th, 1997, in Harris County, Texas. Respondent has also admitted that he was convicted for unauthorized use of a vehicle on May 23, 1996, in Harris County, Texas.

The Service asserts that both driving while intoxicated and unauthorized use of a vehicle are aggravated felonies under Section 101(a)(43)(F) of the Act. With

regard to the driving while intoxicated offense, the Service relies on *In re Magallanes*, Int. Dec. 3341 (BIA 1998).

The Service provided a charging instrument relating to the respondent's conviction for driving while intoxicated. The indictment relating to the respondent's April 8th, 1997, conviction for driving while intoxicated alleges the respondent:

> On or before November 5, 1996, did then and there unlawfully while intoxicated, namely not having the normal use of his mental and physical faculties, by reason of the introduction of alcohol into his body operate a motor vehicle in a public place. [Enhancement paragraphs omitted].

The state of Texas defines driving while intoxicated as follows:

> A person commits an offense if the person is intoxicated while operating a motor vehicle in a public place.

See Section 49.04(a) of the Texas Penal Code. Intoxicated means:

> (A) Not having the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, a dangerous drug, a combination of two or more of those substances or any other substance into the body; or
>
> (B) Having an alcohol concentration of 0.10 or more.

See Section 49.01(2) of the Texas Penal Code.

The Board of Immigration Appeals (the Board) determined that driving while intoxicated under the influence of intoxicating liquor, any drug or toxic substance or any other combination of such substances was a crime of violence (18 U.S.C. 16b); and qualifies as an aggravated felony because an Arizona criminal Court sentenced Magallanes to 2 and 1/2 years in prison.

The description of Magallanes' offense as aggravated and Magallanes' driving with his license suspended did not create the risk which justified the Board's classification of Magallanes' offense as an aggravated felony under Section 101(a)(43) of the Act. The Board justified classification of Magallanes' offense as an aggravated felony based on the risk of personal injury, death and damage to property inherent in driving a vehicle while intoxicated under Arizona law.

The respondent has failed to meaningfully distinguish the offense considered in *In re Magallanes*, from the driving while intoxicated offense committed by the respondent. The difference between driving a vehicle under Arizona law and operating a vehicle under Texas law, is not significant for purposes of evaluating the risk of such activity conducted under the influence of liquor or other drugs.

This Court is bound by precedent decisions of the Board. *See* 8 C.F.R. 3.1(g). Based on *In re Magallanes*, the respondent's offense for driving while intoxicated under Texas law must be classified as an aggravated felony.

With regard to the respondent's offense of unauthorized use of the vehicle, the Fifth Circuit Court of Ap-

peals has recognized unauthorized use of a vehicle as a crime of violence and an aggravated felony (citation omitted).

This Court is bound by precedent decisions of the Fifth Circuit which is a circuit in which the Immigration Court sits.

Based on the Board precedent and of the precedent in the Fifth Circuit Court of Appeals, both of the respondent's offenses are aggravated felonies. In addition, both of these offenses occurred subsequent to the respondent's admission as an immigrant on July 18, 1985.

All of the elements required for the charge under Section 237(a)(2)(a)(iii) of the Act in conjunction with Section 101(a)(43)(F) of the Act are present. The charge under Section 237(a)(2)(A)(iii) of the Act is sustained.

The respondent has applied for cancellation of removal under Section 240A(a) of the Act. Among other criteria, an applicant for relief under Section 240(a)(A) of the Act, must establish that he or she has not been convicted for an aggravated felony defined under Section 101(a)(43) of the Act.

Since respondent has been convicted for two aggravated felonies, he is not eligible for relief under Section 240(a)(A) of the Act.

The respondent has also requested adjustment of status, under Section 245(a) of the Act, in conjunction with a waiver, under Section 212(h) of the Act.

There is no controversy over whether the respondent requires a waiver, because he has been sentenced before to more than one offense for which the aggregate sen-

tences of confinement were five years or more. *See* Section 212(a)(2)(B) of the Act.

A lawful permanent resident of the United States is not eligible for a 212(h) waiver, if the alien has been convicted for an aggravated felony defined under Section 101(a)(43) of the Act. *See* Section 212(h)(2) of the Act. Under these circumstances, the respondent is not eligible for adjustment because he cannot qualify for the required waiver under Section 212(h) of the Act.

The respondent has not identified any other form of relief. He does not appear to be eligible for any form of relief. This leaves no alternative other than to issue an order of removal to the respondent's native country of Mexico.

ORDER

IT IS ORDERED that the respondent's application for cancellation of removal under Section 240A(a) of the Immigration and Nationality Act as amended is denied.

IT IS FURTHER ORDERED that the respondent's application for adjustment of status under Section 245(a) of the Immigration and Nationality Act as amended is denied.

IT IS FURTHER ORDERED that the respondent's application for a waiver under Section 212(h) of the Immigration and Nationality Act as amended is denied.

IT IS FURTHER ORDERED that the respondent be removed to Mexico under Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act as amended.

/s/ WILLIAM K. ZIMMER
WILLIAM K. ZIMMER
Immigration Judge